
DATE: March 13, 1996
CASE NO. 93-ERA-00016

IN THE MATTER OF

THOMAS H. SMITH,

COMPLAINANT,

v.

ESICORP, Inc. (Formerly known as
EBASCO SERVICES, INC.),

RESPONDENT.[1]

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER OF REMAND

This proceeding arises under the whistleblower provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988).[2] Complainant, Thomas "Bubba" Smith (Smith), contends that in late 1991 Respondent, ESICORP, Inc. (Ebasco), harassed and demoted him because he engaged in activity protected under the ERA.

During the three-day hearing, Smith proceeded *pro se.* Ebasco called no witnesses on its behalf but cross examined Smith and his witnesses and submitted documentary evidence. On February 17, 1994, the Administrative Law Judge (ALJ) issued the Recommended Decision and Order (R. D. and O.) that is now under consideration. *See* 29 C.F.R. § 24.6 (1995). After reviewing the entire record, including all the briefs and pleadings of the parties, I agree with the ALJ's decision in many respects, but disagree with his legal conclusion that Smith failed to prove a violation of the ERA. R. D. and O. at 14. I remand for the ALJ to determine Smith's complete remedy.

BACKGROUND

In 1983 Ebasco employed Smith as a carpenter at the South Texas Project Electric Generating Station. Transcript (T.) at 127. Smith was laid off on February 2, 1990, and thereafter he was rehired and laid off repeatedly, about five times. T. at 129-30. His last period of employment was from August 1991, through December 20, 1991.

During his employment at South Texas, Smith was supervised directly by Ebasco personnel, but was overseen by the contractor, Houston Lighting and Power Company (HL&P). T. at 149. Smith primarily was a scaffold builder. A scaffold is an elevated platform, with handrails, toe boards, and ladders, that gives an employee a place to work up off the floor. T. at 440. Smith claims that in 1990 he complained to the Nuclear Regulatory

Commission that the scaffolds at South Texas were not being constructed of scaffold-grade material. T. at 132.

Shortly after he was rehired in August 1991, Smith complained to HL&P officials that Ebasco was improperly disposing of scaffold-grade lumber. HL&P confirmed the impropriety, commended Smith for his disclosure, and requested that he keep them informed of any other improprieties he observed. Complainant's Exhibit (CX) 2; T. at 152. Smith then began contacting HL&P managers about various problems and began filing concerns with HL&P's Speakout program, which investigates nuclear safety concerns at South Texas. *See* T. at 65-66, 142, 275.

At the end of September 1991, Smith informed HL&P that he and two others had worked all day in violation of scaffolding procedures. T. at 160. Ebasco managers were notified. CX 5 at 6. In response, on October 9, 1991, Ebasco suspended Smith for three days without pay. CX 7 at 3.

Smith filed a grievance and, on October 10, complained to the NRC that he was being unfairly suspended, harassed, and intimidated for raising safety concerns. CX 7 at 17, 18. On October 29 he discussed the issues further with the NRC.

Meanwhile, on October 21, 1991, as a result of Smith's identification of numerous deficiencies, Ebasco created a special crew to tear down or repair faulty scaffolds. Smith was named the foreman. T. at 624; CX 12; Respondent's Exhibit (RX) 24. Smith developed about 40 scaffolding procedural changes, which were accepted and implemented by Ebasco on November 1, 1991. T. at 216, CX 18. On December 3, 1991, the special crew was disbanded and Smith was "busted back" to the journeyman carpenter position, with a reduction in pay. T. at 309; RX 25. Smith and the other members of the special crew were then supervised by Jody Johnson. Smith went to the NRC again on December 13, and based on advice given, filed this ERA complaint on December 16, 1991. T. at 661-62. Smith was laid off on December 20.

Smith alleges that Ebasco harassed and subjected him to a hostile work environment. Although he does not contest the December 20 layoff, he challenges both the October suspension and the December demotion, "without which a layoff could not occur." Brief to the Secretary at 10; *see* T. at 9. Smith also contends that during the time that the special crew was working, Ebasco harassed him by ridiculing him publicly with cartoons and by

---

forcing him to go to a medical doctor. Further, Smith contends that after the special crew was disbanded, Johnson harassed him and interfered with his work performance. Ebasco counters that it did not retaliate against Smith for any protected activity but listened, promoted, and commended him for his suggestions.

DISCUSSION

In deciding whistleblower cases under the ERA, I apply the shifting burdens of persuasion and production applicable under Title VII of the Civil Rights Act of 1964. *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 8-12, *appeal filed*, No. 95-1729 (8th Cir. Mar. 27, 1995), citing *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993) and *United States Postal Serv. Bd. v.*

Aikens, 460 U.S. 711 (1983). The ultimate burden of persuading that the employer intentionally retaliated against the employee because of protected activity rests with the employee. *Carroll*, slip op. at 10, citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

As explained below, Smith proved that he engaged in protected activity of which Ebasco was aware. Although he failed to meet his ultimate burden with respect to the alleged adverse actions involving tangible job detriment, he prevails on his hostile work environment claim.[3]

I. *Smith's Protected Activity*

Ebasco first argues that Smith's internal site complaints are not protected. Because this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, I agree. That court has held that section 5851 of the ERA does not protect corporate whistleblowers who file purely internal complaints, but only employees who provide information to competent organs of government. *See Ebasco Constr. Inc. v. Martin*, No. 92-4576 (5th Cir. Feb. 19, 1993); *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1035-36 (1984).[4] I previously have acquiesced and followed *Brown & Root* in other cases arising within the Fifth Circuit. *E.g., Boyd v. ITI Movats*, Case No. 92-ERA-43, Sec. Dec., June 7, 1994, slip op. at 3.

Therefore, in deciding this case, I do not rely on Smith's internal complaints as protected activity. Nor do I rely on Smith's complaints to HL&P's Speakout personnel since it has not been shown or argued that these complaints led to or contributed to an NRC proceeding. *See* T. at 276-77.

As the ALJ found, however, Smith filed protected complaints with the NRC. *See* R. D. and O. at 9. Contrary to Ebasco's argument, Smith established through credible testimony that in 1990 he informed Joe Topia, the NRC resident inspector, that scaffolds were being built of nonscaffold-grade lumber. Since Smith's testimony on this issue is consistent with other evidence

---

and is corroborated by testimony from William Morgan, a former Ebasco foreman over Smith, I accept the ALJ's finding. *See* T. at 130, 407, 415; *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Dec., Jul. 25, 1995, slip op. at 2-3; *Lassin v. Michigan State Univ.*, Case No. 93-ERA-31, Sec. Dec., June 29, 1995, slip op. at 11 (ALJ's credibility determinations may be entitled to special weight).

Smith's concerns involved nuclear safety. Scaffolding at South Texas must be built within specifications set by the Occupational Safety and Health Administration and standards imposed by the NRC. T. at 442, 366. In protected areas of the plant, the NRC requires heavy-duty, seismic built scaffolds that will protect, in the event of an earthquake, the safety related equipment located underneath. T. at 366-70, *see* T. at 247-48. According to Greg Dixon, another one of Smith's prior foremen, Smith's concerns extended to the seismic scaffolding. T. at 341, 343.[5]

The record also shows that Smith contacted the NRC twice in October and again on December 3, 1991, regarding alleged scaffolding violations and perceived retaliation for raising

those allegations. CX 7 at 17; RX/CX 31 at 4.[6] Filing a complaint or charge of employer retaliation under the ERA is protected activity. 42 U.S.C. § 5851(a)(1); *McCuistion v. TVA*, Case No. 89-ERA-6, Sec. Dec., Nov. 13, 1991, slip op. at 7-8. Because Smith's contacts resulted in NRC investigations, I reject Ebasco's argument that his contacts were unofficial. *See* T. at 132-33; CX 7 at 17.[7]

II. *Ebasco's Knowledge of the Protected Activity*

Although the alleged discriminating officials were unaware of Smith's 1990 NRC contact when they rehired him in August 1991, *see* T. at 133, 593-94, these managers became aware of Smith's protected activity shortly thereafter.[8]

Upon returning to work in August 1991, Smith was assigned to the laydown yard. *Compare* T. at 130-32 with R. D. and O. at 4. He was ordered to "clean up" the area, which included throwing away scaffold-grade lumber. Smith thought the work order was wrong and questioned his immediate supervisor, but received no response to his satisfaction. That evening he notified HL&P. CX 29 at 1; T. at 135-36. HL&P investigated, discovered the scaffold-grade lumber in dumpsters, and rebuked Ebasco. T. at 138-39; CX 2. A number of meetings ensued. During questioning, Smith admitted to the Ebasco superintendent, Larry George, that he was the one who had notified HL&P, and Smith explained why, including that "in the prior year, [he] had argued about scaffold-grade lumber and not having scaffold-grade lumber." T. at 139-40. George then told Jack Beach, Ebasco's top manager, that Smith was the person who had involved HL&P in this laydown

---

yard incident. *See* T. at 140, 150. These meetings took place next to the office of Casey Davis, Ebasco's labor relations officer. T. at 139. At the time, Dave Murray was Smith's general foreman and James Kaminsky was the supervisor. See T. at 160, 138.

It reasonably follows that within a short period of time, if not immediately, these Ebasco officials realized that Smith had raised the related scaffold-grade lumber issue with the NRC the year before. In 1990, the NRC conducted a walkdown and instructed HL&P and Ebasco to remove all lumber that did not meet scaffold requirements. T. at 132-33, 415, 519-20. Apparently, Ebasco incorrectly told HL&P that it had complied. T. at 133, 152-53. In connection with the laydown yard incident, HL&P discovered Ebasco's misinformation. T. at 151-53. Considering HL&P's dissatisfaction over this incident; the financial ramifications for Ebasco; and the number, location, and tone of the meetings involved, it is most probable that Smith's managers thoroughly discussed the laydown yard incident, its correlation to the 1990 NRC walkdown, and Smith's involvement. Thus, by September 1991, after the laydown yard incident, Ebasco officials knew or strongly suspected that Smith had contacted the NRC about faulty scaffolds in 1990. *Cf. Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361, 368 (8th Cir. 1994) (adverse action based on employer's suspicion of protected activities violates OSHA). According to Dixon, Smith "stood out" as the carpenter who complained about the scaffolds. T. at 341.

Although there is no evidence that Ebasco specifically was

aware of Smith's October 1991 contacts with the NRC, there is evidence demonstrating that by October 21, Ebasco officials knew that Smith had been an ERA whistleblower. During the time that Smith was foreman of the special crew, Terry Roberts or Robinson, an Ebasco general foreman for equipment operators, drew cartoons of Smith on a board located in the lunchroom. T. 433-35, 527-28, 609-11. Smith's wife, who also works at South Texas, described one of the cartoons as follows:

> Well, it was a picture of you, kind of like as a judge. You had medals on your chest for Speakout and NRC on it. And there was different people out in front of you that you were kind of chastising, you know, the way the picture was showing it.

T. at 483-84. She explained that it was supervisory personnel that he was pictured as chastising.

Al Ybarra, a former co-worker, testified that everyone knew that the cartoons were referring to Smith. T. at 392. Morgan reiterated that it was easy to identify the characters in the cartoons. *See* T. at 433, 458.

Ebasco foremen and general foremen used a section of this

[PAGE 6]
lunchroom as an office, and the carpenter general foreman was aware of the cartoons. T. at 344, 362, 379, 431-32, 435, 526-27.

Although the offices of the higher managers were located elsewhere, T. at 432, many employees, undoubtedly the higher managers included, used or came through the lunchroom to buy sodas and candy bars. T. at 360. In sum, I conclude that Smith's foremen and managers were aware of the cartoons and were aware of Smith's reputation or history as an NRC whistleblower. *Cf. Willy v. Coastal Corp.*, Case No. 85-CAA-1, Sec. Dec., June 1, 1994, slip op. at 13-14 (focus should be on employer's perception of whether the employee engaged in protected activity).[9]

After the hearing, the ALJ admitted certain other evidence relevant to the issue of Ebasco's knowledge of the protected activity. The evidence, CX 30 page 6, is part of the investigatory findings of Speakout personnel on Smith's Concern No. 12251, and it includes the following admissions:

> L. George, Ebasco Site Manager, indicated that he was not aware that [Smith] had raised a concern about the No. 2 grade lumber until late 1991, at which time [Smith] told him that he was the one who had contacted the NRC.
>
> Kaminsky, Ebasco Carpenter General foreman, stated that he was not aware that [Smith] had talked to the NRC until late in 1991.

Compare R. D. and O. at 3. This evidence merely corroborates my earlier finding. Therefore, even if the ALJ erred in admitting and relying on the evidence, which I do not find, the error would be harmless.

III. *Alleged Retaliatory Actions*

A. *The October 8 suspension*

The October 8 reprimand and suspension constitute an adverse employment action. *Floyd v. Arizona Public Serv. Co.*, Case No. 90-ERA-39, Sec. Dec., Sept. 23, 1994, slip op. at 7. Although Ebasco purged Smith's record of the incident following the grievance proceeding, Smith lost 56 hours of pay. T. at 169.[10]

The suspension notice was issued by Casey Davis who Smith claims consulted with Beach and George. CX 7 at 3; CX 5 at 6; CX 34 at 3. It contains the following explanation: "creating quality concerns: not adhering to self verification method and work requirements." CX 7 at 3.

Smith argues that the language, "creating quality concerns," is direct evidence of Ebasco's retaliatory animus. Not only does Smith's argument ignore the remainder of Ebasco's written explanation, but the phrase in itself does not constitute "direct evidence" of animus. It is ambiguous and does not "speak

---

[PAGE 7]
directly to the issue of discriminatory intent." *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569-70 (7th Cir. 1989) ("direct evidence" will prove intentional discrimination without reliance upon inference) cited in *Blake v. Hatfield Elec. Co.*, Case No. 87-ERA-4, Sec. Dec., Jan. 22, 1992, slip op. at 5.

When viewed in its proper context, it is apparent that the phrase reflects Davis' perception that Smith created quality concerns by knowingly working in violation of procedures. The record shows that on a Friday afternoon, Smith telephoned and informed HL&P that "we had worked all day without a work package and that we did not have a pre-job briefing" and that "the forms we had set up were put in the wrong place." CX 5 at 6. Smith testified that he knew they were violating procedures. T. at 159. HL&P started an investigation, followed by Ebasco, and on October 8, the entire crew was suspended -- Smith; his co-worker; and Dixon, the foreman. CX 5 at 7; T. at 163.

Dixon explained that the incident resulted from "a lot of miscommunication." T. at 346. He assumed that Smith "had the [work] package or he wouldn't have been doing the work." T. at 348.

Smith admitted that after the incident Davis told him:

> . . . if this incident or an incident arose like this again, that I should stop what I am doing and contact him, and he would take care of it.
>
> An incident did come forth to my attention, where I was sent to my general foreman . . . and told to tear down a scaffold. Once again, we did not have the work package, . . ., we had no pre-job briefing, and our general foreman had not signed on the work package.
>
> I stopped, and I called Casey Davis. The reason I had once again done this was to show that this was an ongoing incident always happening at our site, where we worked without work packages.
>
> . . . . He in turn told me to hold tight. . . . [Davis and the union steward] came to the site.

> . . . . Davis told the supervisor that he should thank us because we saved him from getting three days' suspension by stopping our work.
>
> . . . due to the fact that we stopped like Casey Davis said, that was the end of it.

T. at 185-86. There is documentary evidence confirming Davis' remark to the supervisor. CX 30 at 16.

[PAGE 8]

In addition, I agree with the ALJ that the fact that Ebasco also punished Smith's co-workers militates against finding that Smith's discipline was retaliatory. R. D. and O. at 13. Smith points out, however, that the electricians working on the same project were not disciplined. T. at 183-84. He also argues that the general foreman, Murray, caused or condoned this violation and permitted similar violations without disciplining workers. Even if true, these facts do not convince me that Smith's discipline was imposed because of protected activity. This particular incident concerned both HL&P and Ebasco whereas there is no evidence that Smith's examples of alleged disparate treatment involved both employers.[11] Even if Smith was disciplined in part because he contacted HL&P about the perceived violation rather than Ebasco officials, that action is not

violative of the ERA as interpreted by the Fifth Circuit prior to the CNEPA amendments.

Davis was shown to be respectful of Smith's right to contact the NRC. RX/CX 31 at 10-11. If anything, Ebasco reduced the discipline because Smith was a whistleblower. Davis "was willing to do whatever to correct [Smith's difference] with them." T. at 353; *see also* T. at 635.[12]

The evidence does not prove, directly or indirectly, that Smith's 1990 complaint to the NRC about nonscaffold-grade lumber was a factor in Davis' October 8 suspension decision. Obviously, the October 8 suspension could not have been motivated by Smith's later complaints to the NRC. *Hasan v. Reich*, No. 92-5170 (5th Cir. May 4, 1993) (timing of employment decision before protected activity eschews causal nexus).

B. *The November 11 medical appointment*

For years Smith had been seeing a chiropractor for a back injury that he suffered in 1983. T. at 212; CX 21. On November 4, 1991, when the special crew was working, he reinjured himself while climbing and inspecting a scaffold. Smith reported the injury to the first aid office. First aid personnel contacted Beach, who encouraged Smith to return to work. T. at 284-86.

On November 11, Beach saw Smith on site and commented, "you look like you are in a lot of discomfort." T. at 286. Smith responded that he was, but that he was capable of doing his job. After consulting with Casey Davis, Beach insisted that Smith see a doctor before he could return to work. Ebasco transported Smith to a doctor off site.

Smith's theory is that Beach wanted to remove him from the workplace, and prevent him from reporting and correcting faulty scaffolding, by forcing him out on workers' compensation benefits. While I assume that Ebasco's action in forcing Smith to see a medical doctor during work hours constitutes an adverse

---

employment action, I agree with the ALJ that the action was not retaliatory under the ERA. *Cf. Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Jan. 19, 1996, slip op. at 6-7 (discretionary order to submit to psychological evaluation was retaliatory).

As evidence of the reasons for its action, Ebasco refers to the Speakout report dated April 7, 1992. CX 11. The report was issued following the internal investigation of Smith's November 11 complaint about this very incident and contains the explanation given by Ebasco. In part, the report states:

> The [Ebasco] manager . . . determined that the individual . . . was physically impaired and should see a physician before attempting to perform regular work duties. . . . [T]he individual could possibly be at risk to himself or other employees in the field in his current condition.

CX 11 at 1-2. Smith failed to prove that this explanation is pretextual.[13]

Smith and Morgan testified that this was not a common practice by Ebasco. T. at 445. However, Smith suffered a severe, uncommon injury. Although Smith attempted to establish that Ebasco did not treat Ybarra in this fashion when Ybarra injured himself, Ybarra did not describe a comparable injury or situation. T. at 381-82. Morgan admitted that Ebasco once scheduled him to see the same off-site physician, Dr. Kilian. T. at 449.

Smith essentially admits that he was in pain and physically impaired on that date. T. at 288. He had a profound limp in his leg and could not use the instep of his foot. T. at 286. He told Dr. Kilian that he was in great discomfort, but threatened to "sue" if the doctor placed him on medical hold. T. at 289; CX 5 at 10. Even Kenneth Strother, a co-worker, testified that Smith gave the impression of being in pain. T. at 534.

In fact, Smith was physically impaired immediately after the injury on November 4. That evening Smith returned to his chiropractor who placed him on light duty. Ebasco was unaware of the restriction. T. at 213.

Thus, there is much support for Beach's November 11 judgment that Smith needed medical attention and presented a possible safety risk.[14] Under these circumstances, Beach was not required to defer to Smith's subjective opinion that he could continue working. *Cf.* T. at 535. The record does not show that Beach realized the extent or severity of Smith's injury until November 11.

Further, I agree with the ALJ that it is not clear that

[PAGE 10]

Smith objected to Beach's offer on November 11. Beach "volunteered" to take Smith to Dr. Kilian after Smith told Beach that his chiropractor was not open that day. T. at 287-88; *see also* T. at 293.[15]

Smith assails the ALJ's "hesitan[ce] to find Respondent acted in a malevolent manner." R. D. and O. at 13. Without hesitation, I find that Smith failed to prove that he was taken to a doctor to prohibit protected complaints to the NRC. Just a few days earlier, Ebasco accepted and implemented Smith's suggested procedural changes for addressing the scaffolding violations. In sum, Ebasco was aware of Smith's reputation as a whistleblower and his commitment to correcting the violations. It had placed him in a position of responsibility for correcting the violations because he was "the most qualified and the most knowledgeable carpenter in scaffolding." T. at 215. I find it improbable that Ebasco would attempt to silence Smith for doing the job it assigned to him.

C. *The December 3 demotion*

Smith asserts that Ebasco's reason for the demotion was "lack of work" and that the reason is a pretext because defective scaffolding remained at South Texas after he was demoted. Pointing out that Ebasco offered no proof that any foremen were laid off at South Texas during December 1991, Smith contends that he would not have been laid off absent the demotion. He admits that he was laid off eventually through a reduction-of-force, but he insists that he was not hired for a certain term. T. at 39,

143; R. D. and O. at 10 n.4. These arguments are unpersuasive.

"Lack of work" was not the explanation proffered by Ebasco for demoting Smith to the journeyman carpenter position. The reason provided was: "No longer needed as foreman. Reduction in manpower." RX/CX 25. After sorting through the record, I conclude that Ebasco hired Smith in August 1991, as a journeyman carpenter to work during an "outage," and it returned him to that position on December 3 to prepare for the upcoming layoff. *See, e.g.,* RX/CX 31 at 8 (Smith stating, "I am on the outage."). Smith concedes that "layoff is predictable in a normal outage." Brief at 12 n.8; *see also* T. at 358, 462.

The outage was over in December 1991, T. at 387, and there is evidence indicating that the layoffs actually began on December 6. RX/CX 31 at 13; *see also* T. at 616, 619.

Smith's appointment to the foreman position on October 21 and the assignment itself were temporary. Throughout the hearing all witnesses, including Smith, referred to the crew as the "special crew," connoting one with a definite and particular purpose. *E.g.*, T. at 284; *see* T. at 513. With the exception of one day in 1989 and his assignment to this "special crew," all of Smith's work for Ebasco over the years had been as a journeyman carpenter. RX 8; RX/CX 3, 9, 12, 16, 20. The record is replete with evidence that Ebasco enlists foremen on a temporary basis. T. at 509. Dixon, Ybarra, Morgan, and Strother all had been foremen at one time or another. T. at 341, 381-82, 384, 408. Even Kaminsky had been "busted back." T. at 160. It is especially revealing that in 1988 another employee who was not a whistleblower was " busted' back to his tools from a foreman

position and just prior to Ebasco going onto the maintenance contract." CX 36 at 2, 3 (Davis).

I agree with Smith that Strother, who worked under Smith on the crew, was reluctant to testify that the crew repaired every faulty scaffold. T. at 513. Strother explained that the remaining faulty scaffolds were removed instead. T. at 529. Even if faulty scaffolds remained at the time Smith was demoted, that does not persuade me that he was demoted in retaliation for protected activity. Although the crew was disbanded, its members continued to work on the scaffolds until shortly thereafter, when they were either laid off or placed on medical leave. T. at 312, 387, 456, 514.[1] Ebasco considered the assignment to correct the scaffolding problems "an important task," T. at 215; *see* T. at 512, and it focused on these problems until the end of the outage.

In any event, the employer is not required to prove a nondiscriminatory reason. *See Hicks*, 113 S. Ct. at 2756. It is not enough to disbelieve the employer; the factfinder must believe the employee's explanation of intentional discrimination.

Hicks, 113 S. Ct. 2754. Although I discount the ALJ's comment that the demotion was "solely the prerogative" of Ebasco,[2] I agree that the evidence fails to prove Smith's claim that the demotion was retaliatory under the ERA.

[PAGE 11]

D. *The permanent groundsman job*

Smith alleges that on December 5 his new foreman, Jody Johnson, harassed him for engaging in protected activity by requiring him to perform a more difficult and dangerous job. Smith's protected activity was not a reason for this alleged adverse action. *See DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983) (transfer to a less desirable job may constitute adverse action).

Johnson instructed Smith to climb the scaffold and Morgan to be the groundsman based on their relative physical conditions. RX/CX 31 at 9; T. at 326; *compare* T. at 328. Johnson explained that Morgan had a bad knee while Smith had a complete medical release. Under cross examination, Morgan ultimately confirmed that Johnson put him in the groundsman job for safety reasons because he had a very serious problem with his knee. T. at 467. Ebasco's safety representative came out to the site and after finding that Dr. Kilian had no openings that day, scheduled Morgan to see the doctor the very next day. T. at 467-68. After going to the doctor, Morgan did not return to work but rather had surgery. T. at 456.

While Johnson may have been aggravated by the numerous physical complaints and limitations of his crew, and even if Johnson erred in assessing the relative conditions of Morgan and Smith, Smith has not shown that Johnson's decision was based on retaliation for protected activity. *Cf. Jefferies v. Harris County Comm. Action Assoc.*, 615 F.2d 1025, 1036 (5th Cir. 1980) (employer does not violate Title VII in acting on mistaken but sincere and nondiscriminatory belief). Pressure by Johnson or Kaminsky to increase production or to take needed medical leave does not evince retaliatory animus. *See* T. at 453.

E. *The work environment*

The Secretary has recognized that the hostile work environment theory of discrimination is remediable under various environmental whistleblower protection provisions, including the ERA. *Varnadore v. Oak Ridge Nat'l Lab.*, Case No. 92-CAA-2, Sec. Dec., Jan. 26, 1996, slip op. at 77; *Marien v. Northeast Nuclear Energy Co.*, Case No. 93-ERA-00049, Sec. Dec., Sept. 18, 1995, slip op. at 7; see also *English v. Whitfield*, 858 F.2d 957, 963-64 (4th Cir. 1988). Hostile work environment cases involve issues of the environment in which the employee works and not "tangible job detriment." *Varnadore*, slip op. at 77 n.93.

For retaliatory harassment to be actionable, it must be sufficiently severe or pervasive as to alter the conditions of employment and create an abusive or hostile work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). In *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370 (1993), the Court discussed some of the factors that may be weighed but

---

[PAGE 12]

emphasized that whether an environment is hostile or abusive can be determined only by looking at all the circumstances. Tangible psychological injury is not required. *Harris*, 114 S. Ct. at 370.

Smith argues that the series of cartoons ridiculing his protected activity fostered and encouraged a hostile working environment. I agree. Through undisputed evidence, Smith established the necessary elements of proof, *i.e.*, that he suffered intentional, pervasive, and regular harassment based on protected activity, of which Ebasco foremen and managers were aware and which Ebasco permitted to continue. *See Varnadore*, slip op. at 79-80, citing *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 753, 756 (3d Cir. 1995).[3]

The ALJ found that although "the cartoons were most certainly of an abusive and harassing nature," they were not shown to be sufficiently severe and pervasive to create a hostile work environment. R. D. and O. at 13-14. He stated that it was

unclear what the cartoons depicted, how many were displayed, and how long they were displayed. I disagree.

Over a period of about two and one-half months, just after Smith's October 1991 protected activity, an Ebasco foreman drew numerous cartoons ridiculing Smith on a drawing board located in the lunchroom. Contrary to the ALJ's finding, the cartoons clearly depicted Smith as an NRC whistleblower. As mentioned previously, Smith's wife, whose testimony the ALJ expressly credited, characterized the cartoons as board-sized colored drawings, picturing Smith as a judge with NRC medals on his chest chastising Ebasco management. T. at 483-84; *see* R. D. and O. at 10. Ybarra remembered "a picture with the name Bubba hollering out the gate. And [he] remember[ed] other drawings having The eyes of Bubba are upon you' or something like that." T. at 380. Everybody at South Texas knew Smith as Bubba. T. at 392.

The cartoons constitute a series or pattern of retaliatory jokes and comments sufficient to satisfy the second element of proof. *See Dey v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1456 (7th Cir. 1994). During this several month period, a battery of overtly retaliatory cartoons appeared in a common workplace area frequented by employees and utilized by carpenter foremen as an office. Dixon, who was a foreman, acknowledged repeatedly, "there were so many drawings." T. at 345. Morgan testified that he saw at least four or five different cartoons of Smith. T. at 433. As explained by both Dixon and Morgan, a cartoon would remain on the drawing board for a period of time and then be replaced by another.

> You know, if it went two or three days, sometimes it would be up all day. And then the next day, there would be a new cartoon.

T. at 434; *cf.* T. at 362. Not all of the cartoons pertained to Smith, but the majority did. T. at 434.

Numerous witnesses testified, without contradiction, that the cartoons were sarcastic and derogatory. T. at 393, 434. Morgan confessed that some were funny and some were tacky, but for the most part they were insulting to Smith. T. at 434.

Not surprising, Smith found the cartoons abusive. His reaction is illustrated by the following question he posed to his wife at the hearing:

> . . . did I not myself call you because I was upset over the daily drawings of these and ask you to come over and look at these?
>
> Yes, you did. Because you told me, Toni, you are not going to believe this. There is a new one. So I said, okay.

T. at 489-90. The cartoons contributed to Smith's perception of additional retaliation and detracted from his work performance by making him more combative, less productive, and generally uncomfortable in his surroundings.

Any reasonable employee concerned in the least with nuclear safety would have regarded these cartoons as offensive. Morgan thought it was wrong. T. at 458. The destructive impact of such harassment, created and/or condoned by management, on the workplace environment is apparent. It is tantamount to intimidation, having a chilling effect on open communication between Ebasco employees and the NRC, and counteracts the purpose of the ERA. *Cf. DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 473 (1995)(emphasizing that claim for sexually hostile work environment should be viewed with purpose of equality in the workplace in mind). Any reasonable employee would have reacted to the cartoons in much the same manner as Smith, *i.e.*, by perceiving additional retaliation.

I conclude that Smith has shown that his harassment was sufficiently severe or pervasive as to alter the conditions of his employment and create an abusive work environment. The final element of proof is met in that Ebasco management had notice and did not attempt to remedy the abuse. *See* T. at 361-62 (Dixon), 379-80 (Ybarra), 435 (Morgan); *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (1988), *motion denied*, 488 U.S. 812 (1988). Instead, they laughed about it. T. at 435, 485.

THE REMEDY

The ERA provides that upon finding a violation the Secretary shall order the respondent to take affirmative action to abate

---

[PAGE 14]

the violation. Compensatory damages are also available, *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992), and a complainant may recover all costs and expenses reasonably incurred in bringing the complaint. 42 U.S.C. § 5851(b)(2)(B).[4]

Smith requests that he be permitted on remand to supplement the record with evidence relevant to compensatory damages. Since at the earlier hearing Smith appeared *pro se* and was not questioned about any resulting physical or mental suffering, the ALJ shall afford the parties an opportunity to present relevant evidence and any opposition thereto, and shall recommend the amount of appropriate damages.[5] *See Tritt v. Fluor Consts., Inc.*, Case No. 88-ERA-29, Sec. Dec., Mar. 16, 1995, slip op. at 3 n.2; *Pillow v. Bechtel Const., Inc.*, Case No. 87-ERA-35, Sec. Dec., Jul. 19, 1993, slip op. at 27, *appeal filed*, No. 94-5061 (11th Cir. Oct. 13, 1994).

ORDER

Accordingly, Ebasco is ORDERED to post this decision in the lunchroom and in another prominent place, accessible to all of its employees at the facility, for a period of ninety days. Ebasco shall pay Smith's costs and expenses in bringing this complaint, including a reasonable attorney's fee.[6] This case is hereby REMANDED to the ALJ for a determination of Smith's entitlement to compensatory damages, attorney's fees, and expenses, and any other appropriate relief.

SO ORDERED.

ROBERT B. REICH

Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1]
The caption has been modified to reflect the Respondent's name change. *See* letter from ESICORP, Inc. to the Office of Administrative Appeals, dated December 2, 1994.

[2]
The amendments to the ERA contained in the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. No. 102-486, 106 Stat. 2776 (Oct. 24, 1992), do not apply to this case in which the complaint was filed prior to the effective date of the amendments.

[3]
Since Smith is not entitled to back pay, proposed exhibit CX 38 is irrelevant, and I need not address the ALJ's ruling rejecting the exhibit.

[4]
The Fifth Circuit was the only federal judicial circuit to hold that internal complaints were not protected under the ERA as it stood when this complaint was filed. The 1992 amendments provide express coverage for internal complaints, legislatively overturning the Fifth Circuit's rulings.

[5]
The undisputed evidence of record is sufficient to establish that Smith raised reasonable, nuclear safety related concerns. It is, therefore, unnecessary to rule on Smith's argument that his witnesses be considered "experts" under 29 C.F.R. § 18.702-704 (1995). Despite Ebasco's implication, protection is not dependent on the NRC substantiating the charges. *McDonald v. University of Missouri*, Case No. 90-ERA-0059, Sec. Dec., Mar. 21, 1995, slip op. at 11-12.

[6]
After the hearing Smith offered CX 37 to corroborate his October contact with the NRC. I need not address the ALJ's decision to reject the proposed exhibit since CX 37 is only cumulative and would not affect the outcome of this case.

[7]
Although Smith contacted the NRC again on December 13 and filed this complaint on December 16, this case does not involve those protected activities. Smith does not allege any retaliation occurring after December 5. T. at 328-29.

[8]
I decline to draw unfavorable inferences solely from Ebasco's failure to call witnesses, as Smith urges. As illustrated here, however, by failing to call witnesses, Ebasco assumed the risk

that Smith's uncontradicted evidence would be found credible.

[9]
I do not rely on CX 22 at 6 as evidence of Ebasco's prior knowledge. *See* R. D. and O. at 10. That evidence consists of a letter from Smith to Davis, dated December 5, 1991.

As noted previously, Smith does not allege any retaliation occurring after the December 5 letter was delivered to Davis.

[10]
Ebasco implies that Smith's decision to settle at Step Two of his grievance is equivalent to an admission that the adverse action was taken for legitimate, nondiscriminatory reasons. I disagree. Smith testified that he believed he was bound by his union representative's action in settling the grievance. T. at

600. There is insufficient evidence of the circumstances of the grievance proceeding to render any of those findings conclusive in this case. *Cf. Sawyers v. Baldwin Union Free Sch. Dist.*, Case No. 85-TSC-00001, Sec. Dec., Oct. 24, 1994, slip op. at 17-19 (discussing collateral estoppel).

[11]
Smith's testimony indicates that HL&P may have provided input into Ebasco's decision to suspend him. T. at 160-61. Smith stated that the suspension occurred after a meeting with an individual who worked for Don Clifford, a HL&P manager. T. at 160; CX 5 at 6. Smith continued, "I was somewhat stunned since I had only done as I was told by Houston Lighting and Power, and contacted them." T. at 161.

[12]
For example, in the letter from Smith to Davis, dated December 5, 1991, Smith opines that Johnson "has some problem with me going to Speakout and the NRC." CX 22 at 6. After the December 5 letter was delivered to Davis, Smith "had no more problems with [his] foreman." T. at 328-29.

[13]
Smith argues that Ebasco failed to rebut his *prima facie* case. I question whether Smith even made a *prima facie* case on this allegation. In any event, I find CX 11 sufficient to rebut and shift the burden back to Smith. Since an employer may meet its burden by cross examining the employee's own witnesses, *see Lieberman v. Gant*, 630 F.2d 60, 65 n.8 (2d Cir. 1980), it should be permitted to rely on evidence such as CX 11, submitted and pursued by the employee at the hearing as the employer's explanation. The evidence certainly "frames the factual issue with sufficient clarity to afford the employee a full and fair opportunity to demonstrate pretext," which is one of the purposes of placing the burden of production on the employer. *See Meiri v. Dacon*, 759 F.2d 989, 996-97 (2d Cir. 1985), *cert. denied*, 474 U.S. 829 (1985). As used by Ebasco CX 11 raised a genuine issue of fact as to whether the employer discriminated against the employee. *Burdine*, 450 U.S. at 254-55.

[14]
Smith challenges the ALJ's reliance on post-hoc evidence. The ALJ stated that Smith "clearly was injured as evidenced by the fact that he eventually required surgery for the condition . . . ." R. D. and O. at 13. This later evidence is simply corroborative evidence that Beach's November 11 judgment was reasonable.

[15]
In a tape recorded conversation on December 5, 1991, Smith was still complaining about his back problem and stated:

> They know I have two herniated disks in my back. They know I have a problem with my foot. They know I am on medication, they need -- [to take] me to my own doctor. They know this. . . .

RX/CX 31 at 9.

[16]
Ybarra was laid off in December; Morgan was placed on a medical hold in December. Although Strother was not laid off until February 21, 1992, he had more years of service than Smith and was considered "the top, the top, lead carpenter[]." *See* T. at 127, 500, 503, 544; RX/CX 31 at 16.

In addition, Smith's theory that Ebasco sought to conceal violations from HL&P does not implicate retaliatory animus under the ERA as interpreted by the Fifth Circuit prior to the CNEPA amendments.

[17]

Ebasco possesses broad rights under the union contract, however, terms of collective bargaining agreements do not diminish rights afforded to employees under the ERA. *Cf. Robinson v. Duff Truck Line, Inc.*, Case No. 86-STA-3, Sec. Dec., Mar. 6, 1987, slip op. at 23 n.12, *aff'd*, No. 87-3324 (6th Cir. June 24, 1988) (under analogous Surface Transportation Assistance Act).

[18]
More specifically, the elements of proof are: (1) the employee engaged in protected activity and suffered intentional retaliation as a result, (2) the retaliation was pervasive and regular, (3) the retaliation detrimentally affected the employee, (4) the retaliation would have detrimentally affected other reasonable whistleblowers in that position, and (5) the existence of respondeat superior liability.

[19]
I deny Ebasco's request for fees and expenses. Neither the ERA nor Fed. R. Civ. Proc. 11 affords a basis for this claim. *Saporito v. Florida Power & Light Co.*, Case No. 90-ERA-0027,

Aug. 8, 1994, slip op. at 5.

I also deny Smith's request for punitive damages. The ERA does not provide for such damages, and the Secretary has held that punitive damages are not allowable absent express statutory authorization. *See Dodd v. Polysar Latex*, Case No. 88-SWD-00004, Sec. Dec., Sept. 22, 1994, slip op. at 19, and cases cited therein.

[20]
In view of this ruling, I need not address Smith's argument for supplementing the record.

[21]
Although Smith appeared *pro se* at the hearing before the ALJ, he did secure counsel to represent him after the hearing.